TANG HEE HING

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
HASHIM YEOP SANI CJ (MALAYA)
MOHD. YUSOFF MOHAMED SCJ
GUNN CHIT TUAN SCJ
[SC CRIMINAL APPEAL NO. 43/86]
25 JANUARY 1991

CRIMINAL PROCEDURE: *Dangerous drugs - Cautioned statement - Admission of ownership of opium - Denial at defence stage - Conviction on plea of guilty - Unequivocal or qualified - Date of amendment act which imposed mandatory death sentence - Whether appellant aware of amendment - Acceptance of imperfect plea by trial Court - Quashing of conviction - Retrial.*

The appellant T was originally charged with another co-accused C on two charges of trafficking opium under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) and one charge under s. 10(2) of the Act. The prosecution tendered a cautioned statement, P40 whereby T admitted that the opium belonged to him; P40 was admitted as a voluntary statement made by T. Evidence was adduced that the premises on which the opium and opium smoking utensils were found were rented to C and that T was staying with C.

At the close of the prosecution case, C was acquitted and T entered his defence; he denied that he had made the statement in P40 of admission of guilt whereby he had stated that he was prepared to plead guilty if C could be released as he did not want her to be involved and the opium belonged to him.

The trial Judge wrote his judgment 2 years after the conviction and commented on the round about turn by T; the Judge also said that T was convicted on the basis of the plea and the evidence of the prosecution.

Held:

[1] (a) When the learned Judge made his finding that the appellant had made a round about turn, it is a fair conclusion that this round about turn means the admission by the appellant that the opium belonged to him as stated in the appellant's cross-examination;

(b) however, a perusal of the cross-examination reveals that the appellant was merely referring to the statement he made in the trial-within-a-trial with regard to P40, that is, he was prepared to plead guilty if the second accused could be released.

[2] (a) In his grounds of judgment the learned Judge convicted the appellant based on the appellant's supposed plea of guilty and the evidence of the prosecution;

(b) even if what the appellant said amounted to a plea of guilty, before such a plea could be accepted by the Court, the Court must be satisfied that the plea is unequivocal;

(c) it is not clear if T understood the true ingredients of the charge as the word "traffic" which was used in the first two charges is the result of presumption arising from possession of drugs above the statutory amount.

(d) in this case it is clear that the plea is a qualified plea and when the plea of guilty is not clear, doubtful or qualified it should not be accepted as a plea of guilty.

[3] (a) The amendment to impose the mandatory death sentence by Act A553 on 14 April 1983 was enacted only a few months before the date of the charges;

(b) even assuming that what the appellant said amounted to a plea of guilty where capital punishment is involved, it must clearly be shown that the accused knew not only the nature of his plea but also the nature of the punishment he was liable to receive as a consequence of his plea; it is not known whether T was aware of the amendment.

[4] There is no indication in the appeal record and the notes of proceedings what the basis was for the acquittal of C and the calling of the appellant to enter his defence except that there is a note to the effect that "no *prima facie* case" had been made against the second accused.

[5] (a) The real meaning of a plea of guilty is that the accused agrees to all the ingredients of the offence and all the averments in the charge.

(b) what appears from the record here is that the Court in this case accepted the plea of the appellant which is a qualified plea and considered the evidence before him in the light of the plea;

(c) that the learned Judge could not have based the conviction on the evidence alone.

[6] Where the trial Court has accepted an imperfect plea the appellate Court may quash the conviction and has a discretion to order or not to order a retrial. In the light of what was stated earlier with regard to the plea, the conviction was not a true and satisfactory conviction.

[Conviction quashed; retrial ordered.]

Case referred to:
Lee Weng Tuck & Anor. v. PP [1989] 1 CLJ (Rep) 75

Legislation referred to:
Dangerous Drugs Act 1952, ss. 10(2), 39B(1)(a), 39B(2)

For the appellant - Paramjit Singh; M/s. Paramjit & Co.
For the respondent - C.T. Wong, Deputy Public Prosecutor

JUDGMENT

Hashim Yeop Sani CJ (Malaya):

On 24 July 1986 the appellant was convicted for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Act 234) punishable under s. 39B(2) of the Act and was sentenced to death in the High Court, Ipoh. On appeal we set aside the conviction and sentence and ordered a retrial. We now give our reasons.

The appellant was originally charged with another co-accused, a female, on two charges under s. 39(1)(a) of the Act and one charge under s. 10(2) of the Act. The charges stated that on 24 October 1983 they were allegedly trafficking in raw opium weighing 1583.8 grammes and prepared opium weighing 4056.0 grammes and they were also allegedly on the same date and place to be in possession of various opium smoking utensils.

The prosecution closed after calling 14 prosecution witnesses who were mostly formal witnesses. The evidence adduced was that after his arrest the appellant brought police officers to the premises where the exhibits were recovered. The premises in question, that is premises No. 73-B Jalan Yang Kalsom, Ipoh was rented to the female accused and the appellant was staying with her. There was also admitted a cautioned statement made by the appellant which the learned Judge held to be a voluntary statement. The cautioned statement was admitted as Exhibit P40. In the statement the appellant admitted that the opium belonged to him.

At the close of the prosecution case the learned Judge acquitted the female accused and called the appellant to enter his defence. The appellant's testimony was brief. The gist of his examination-in-chief appears in a few sentences appearing at pp. 137-139 of the appeal record where he denied the statement he made in Exhibit P40. In his cross-examination he repeated what he said in the trial-within-a-trial in relation to Exhibit P40 that:

> Even until today I am prepared to plead guilty if the 2nd accused could be released. I do so because I do not want her to get involved. As the opium belong to me. No one advised me to plead guilty.

He was duly convicted and sentenced to death.

The grounds of judgment of the learned Judge was written on 26 January 1988, that is nearly two years after the conviction. In the grounds of judgment there was a narration of the facts adduced in the evidence and on the last page of the grounds the following appears:

> The accused has made a round about turn. The Court has considered this change of stand with great care. But I have found no reason to reject the stand taken by the accused. I accepted his evidence after being satisfied that he understood the nature and consequences of his statement.
>
> In the light of this plea and in the light of the evidence adduced by the prosecution, I found the accused guilty and accordingly convicted and sentenced him to death.

Two things need to be observed in the grounds of judgment of the learned Judge. Firstly, it was the learned Judge's finding that the appellant had made a round about turn. It is a fair conclusion that this round about turn means the admission by the appellant that the opium belonged to him as stated in the appellant's cross-examination. But a perusal of the cross-examination will reveal that the appellant was merely referring to the statement he made in the trial-within-a-trial with regard to P40, that is, he was prepared to plead guilty if the second accused could be released.

Secondly it is also to be observed that in his grounds of judgment the learned Judge convicted the appellant based on the appellant's supposed plea of guilty and the evidence of the prosecution.

It is elementary that even if what the appellant said amounted to a plea of guilty, before such a plea could be accepted by the Court, the Court must be satisfied that the plea is unequivocal. In this case it is clear that the plea is a qualified plea. When the plea of guilty is not clear, doubtful or qualified it should not be accepted as a plea of guilty.

The first two charges against the appellant carry the mandatory death sentence. It is to be observed that the amendment to impose the mandatory death sentence by Act A553 on 14 April 1983 was enacted only a few months before the date of the charges. Even assuming that what the appellant said amounted to a plea of guilty where capital punishment is involved,

it must clearly be shown that the accused knew not only the nature of his plea but also the nature of the punishment he was liable to receive as a consequence of his plea. This Court emphasised that aspect of the procedure to be followed recently in *Lee Weng Tuck & Anor v. PP* [1989] 1 CLJ (Rep) 75:

> In capital cases, we are of the view that even if the accused is represented by Counsel when he pleads guilty, there must be some indication on record to show that the accused actually knows not only the nature of his plea of guilty to the charge, that is the nature of the capital offence he is pleading guilty to, but also the consequences of his plea, that is there will be no trial and that the sentence of death may be imposed on him even though such sentence is not mandatory.

What was said in *Lee Weng Tuck* is especially applicable in the present case because the amendment Act which imposed the mandatory death sentence had only recently been passed and it is not known that the appellant was aware of the amendment.

The real meaning of a plea of guilty is that the accused agrees to all the ingredients of the offence and all the averments in the charge. Can it be said that this requirement is satisfied in the present case where the word "traffic" is used in the first two charges although we know that under our law the word "traffic" is the result of the presumption arising from possession of drugs above the statutory amount? Can it be said then that the appellant here understood the true ingredients of the charge?

There is no indication in the appeal record and the notes of proceedings what the basis was for the acquittal of the second accused and the calling of the appellant to enter his defence except that there is a note to the effect that "no *prima facie* case" had been made against the second accused. Since the prosecution evidence, if any, was that of possession, then it is fair to conclude that the appellant was called upon to enter his defence on the presumption of trafficking based on the amount of opium found in the premises.

To summarise, what appears from the record here is that the Court in this case accepted the plea of the appellant which is a qualified plea and considered the evidence before him in the light of the plea. This is clear when the learned Judge wrote in the notes that the conviction was based on the plea **and** the evidence of the prosecution. This also implies quite clearly that the learned Judge could not have based the conviction on the evidence alone.

Where the trial Court has accepted an imperfect plea the appellate Court may quash the conviction and has a discretion to order or not to order a retrial. In the light of what was stated earlier with regard to the plea, it was our view that the conviction was not a true and satisfactory conviction and should be quashed. In the circumstances of this case we ordered a retrial.

Conviction quashed. Retrial orderd.

Also found at [1991] 2 CLJ 916